IN THE HIGH COURT OF TANZANIA
AT TABORA
MISC. CIVILAPPLICATION No. 64 OF 2014
MAKOYE KINTOKI..... APPLICANT
VERSUS
AMOS MAGANGA.....RESPONDENT

RULING

26/05/2016 & 21/06/2016

UTAMWA, J

This is a ruling on a preliminary objection (PO) raised by the respondent AMOS MAGANGA against the application filed by the applicant MAKOYE KINTOKI.

The application is made by way of chamber summons supported by an affidavit. It is preferred under sections (ss.) 14 (1) of the Law of Limitation Act, Cap. 89 R. E. 2002, 95 of the Civil Procedure Code, Cap. 33 R. E. 2002 and any other enabling provisions of law. The application seeks for the following orders which I quote verbatim for the sake of a readymade reference;

1. That, this court be pleased to grant leave to the applicant to appeal out of time against Civil Case No. 51/2001 Kahama District Court.
2. That, the trial court be compelled to issue proper decree in Civil Case No. 51/2001 to the applicant.
3. That, costs of this application be provided for;
4. That any other relief(s) this court deems fit to grant.

The respondent objected the application and lodged the PO. The PO was argued by way of written submissions. The respondent's submissions were drawn by Mr. Audax T. Constantine learned counsel (of AK Law Chambers) while those by the applicant were crafted by Mr. Mussa Kassim, learned counsel (of RMK Advocates Chambers).

According to the respondent's counsel written submissionsin chief filed in court on the 22nd December, 2015 the PO is essentially based on the following three points of law; In the first place the learned counsel for the respondent argued to the effect that the first two prayers in the chamber summons could not be combined in one chamber summons. The reasons for this argument are that the two prayers are diametrically opposed to each other. He supported the argument by the Court of Appeal of Tanzania (CAT) decision in the case of **MIC Tanzania Limited v. The Minister for Labour and Youth**

Development and Attorney General, CAT Civil Appeal No. 103 of 2014, at Dar es salaam (unreported). The other reason for the argument was that, the prayers are grantable under two different laws. As for this ground he cited the case of **Jovin Mutagwaba and 85 others v. Geita Gold Mining Limited, CAT Civil Appeal No. 22 of 2014, at Mwanza** (unreported) to fortify the contention.

Regarding the second point of law the learned counsel for the respondent argued to the effect that there was a wrong citation of the enabling law in the chamber summons since s. 95 of Cap. 33 which provides for inherent powers of the court does not apply where there is specific applicable law. He fortified the contention by citing decisions of this court in the cases of **Shaku Haji Osman Juma v. Attorney General and Two others [2000] TLR 49** and **Bunda District Counsel v. Virian Tanzania Ltd [2000] TLR. 385.** He also contended that the phrase "any other enabling provisions of law" cited in the chamber summons as part of the law under which the application was brought is useless in law following the decision of this court in **Elizabeth Steven and another v. Attorney General [2006] TLR 404.** The learned counsel for the respondent further submitted that since s. 14 (1) of Cap. 89 was the proper applicable law in the matter at hand, then s. 95 of Cap. 33 and the phrase "any other enabling provisions of law" were irrelevantly cited in the chamber summons, hence the court was improperly move.

As to the third point of law the learned counsel for the respondent contended to the effect that since according to the chamber summons and the affidavit supporting it the applicant seeks for an extension to appeal out of time against an ex-parte judgment, the application is untenable. The argument is based on the ground that the law requires the applicant to firstly apply for setting aside the ex-parte decree under Order IX Rule 13 of Cap. 33 and in case his application fails, he would come to this court by way of appeal only. He cited the case of **Mandi s/o Mtaturu v. Mtinangi [1992] HCD 150**to back up his argument.

For the generality of the above arguments the learned counsel for the respondent urged this court to find the application incompetent and accordingly strike it out with costs.

In his replying written submission the learned counsel for the applicant argued that according to the chamber summons and the affidavit supporting it the applicant seeks for extension of time to appeal against the ex-parte decree, but following the defective decree issued by the District Court his two attempts

to appeal against the decree failed. This is the reason for combining the first two prayers. He argued further that the prayed extension of time will thus be meaningful only if it is accompanied with the order for the District Court to issue a proper decree since it is that court and not the applicant which is responsible for issuing the decree. He thus submitted that the two prayers are inter-related, hence fit for been combined in one chamber summons. He also contendedthat the precedents cited by the learned counsel for the respondent do indeed support the applicant's argument; he thus urged the court to overrule the PO with costs.

In his rejoinder submissions the learned counsel for the respondent did nothing other than reiterating his submissions in chief and his previous prayers, hence this ruling.

I have considered the chamber summons, the affidavit supporting it, the arguments by the parties and the law. In my adjudication plan I will first test the third point of the PO (on the complaint related to the intention to appeal against the ex-parte decree). If need will arise I will then test the first and second points of law. The plan is based on the ground of convenience since if the third point of law will be upheld there will be no need for testing the rest of the points of law as the same is forceful enough to dispose of the entire matter.

I now test the third point of PO. Regarding this point it is not disputed by the parties(from the affidavit and written submissions) that the applicant indeed seeks for extension of time to appeal against the ex-parte decree of the District Court. The parties are also not in squabble that the applicant did not attempt to set aside the ex-parte decree before the District Court. However, it is clear from the submissions that the learned counsel for the applicant did not address himself to the argument related to the second and third points of the PO. He only concentrated on the first point of the PO. The arguments by the learned counsel for the respondent regarding the third point of the PO (now under consideration) thus went unopposed. However, the fact that such arguments were not contested will not form the sole basis for my decision. I will still examine it (the third point of the PO) according to the law. This course follows the firm legal stance that courts of law are enjoined to decide matters before them in accordance with the law and Constitution irrespective of the attitude taken by the parties to court proceedings. This stance of the law is indeed the very spirit underscored under article 107B of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002. I also underlined this position in my many other previous decisions including**Rajabu Juma Mwasegera v.**

Mariam Hassan, High Court (PC) Civil Appeal No. 13 of 2014, at Tabora (unreported) and **Rashid s/o Khalid @ Masanja v. The Republic, High Court Criminal Application No. 36 of 2015, at Tabora** (unreported). I reiterate the position of the law in the case at hand.

The question that I must pose to myself and answer is thus whether or not according to our law an ex-parte decree is appealable before the judgement debtor unsuccessfully applies for setting aside the ex-parte decree before the court that passed it. The learned counsel for the respondent inspired this court to answer the question negatively and cited the **Mandi s/o Mtaturu case** (supra) to support the contention. He argued further that the applicant had to first apply for setting aside the ex-parte decree before he could come to this court by way of appeal in case his application was rejected. There were no any counter arguments on this point as observed previously.

I had an opportunity of going through the **Mandi s/o Mtaturu case** cited by the learned counsel for the respondent and I agree that this court made the principle in favour of the arguments advanced by him. In that case a party aggrieved by an ex-parte decree of a primary court applied before the District Court for extension of time with which to file an appeal against the ex-parte decree out of time. The District Court proceeded to decide the appeal on merits before it could decide the application. The High Court later held (on appeal)*inter alia* that the application (for extension of time) was brought before the District Court prematurely since the only way to seek to avoid a judgment ex-parte was to apply to the very court which made the order for setting it aside. Though this decision was related to an ex-parte decree passed by a primary court the principle set in that decision by the High Court still applies*muatis mutandis* in this matter arising from a decision of the District Court by parity of reasons. This view is backed up by other precedents related to ex-part decisions made by District or Resident Magistrates' courts and other courts with similar powers to them as cited herein below.

Apart from the **Mandi s/o Mtaturu case** (supra) other precedents of superior courts of this land support the respondent'slearned counsel arguments. In the case of **Managing Director of NITA Corporation v. Emmanuel L. T. Bishanga [2005] TLR. 378**(by Luanda J, as he then was) for instance, a court of Resident Magistrate passed a decree ex-parte. The judgment debtor appealed to the High Court without first making any attempt to apply before the trial court for setting aside the ex-parte decree. On appeal this court held that an appeal does not lie from such a judgment passed *ex-parte,* the proper course for

the appellant to take was to apply to the Resident Magistrates Court under Order IX rule 13 (2) of Cap. 33 for setting aside the ex-parte decree. The position was also underscored in the case of **Asha Hassan Almas and another v. Menard Mugeta Manya High Court Civil Appeal No. 17 of 2002, at Mwanza** (by Mihayo J, as he then was, unreported) where it was held that a party aggrieved by an ex-parte decree cannot appeal on the substantive case before praying for leave to set aside the ex-parte judgment. The CAT cemented this position by its envisaging in the case of **The Government of Vietnam v. Mohame Enterprise (T) Ltd, CAT Civil Appeal No. 122 of 2005, at Dar es salaam** (unreported). The principle applies even before Land Courts by virtue of rules related to land disputes, see for the example the holding in the land case of**John Juma Mfanga v. Abiyas Henry, High Court Land Case Revision No. 2 of 2003, at Dodoma** (by Lugaiziy, J, unreported) which originated from a District Land and Housing Tribunal.

I have also considered the provisions of s. 70 (1) and (2) of Cap. 33. The provisions of s. 70 (1) guide that, save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed by a court of a resident magistrate or a district court exercising original jurisdiction. In my view the phrase "save where otherwise expressly provided in the body of this Code" embodied into such provisions of law refer to provisions of law like Order IX rule 13 (2) of Cap. 33cited in **the Managing Director of NITA Corporation case** (supra). The construction of the law is thus as stated above, i. e. unless one unsuccessfully applies for setting aside the ex-parte decree under Order IX rule 13 (2) of Cap. 33, he cannot appeal against such an ex-parte decree.

On the other side s. 70 (2) of Cap. 33 provides that an appeal may lie from an original decree passed ex-parte. In my view, for the existence of these provision on one hand and the construction of the law by the courts through the precedents cited herein above on the other, I firmly conclude that s. 70 (2) of Cap. 33 applies only where there is an ex-parte decree and the judgement debtor has unsuccessfully applied for setting aside the same before the court which passed it. I thus depart from the decision of this court in the case of **The Registered Trustees of the Apostles of Jesus v. Hellen James, High Court Misc. Civil Application No. 10 of 2011, at Arusha** (unreported) which held to the effect that by virtue of s. 70 (2) of Cap. 33 an ex-parte decree can be appealable even without the judgment debtor unsuccessfully applying for setting it aside under Order IX Rule 13(2) of Cap. 33.

I think I am more vindicated in my stance by the decision of the CAT in **The Government of Vietnam** case (supra). It must be noted here that decisions of the CAT are binding to tribunals and courts subordinate to it including the one I am currently presiding over, see the CAT decision in the case of **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda Cha Uchapishaji cha Taifa [1988] TLR. 146.** This stance of the law is by virtue of the common law doctrine of *stare decisis* which is also applicable in our jurisdiction. I thus believe that had the attention of this court in deciding **The Registered Trustees of the Apostles of Jesus case** (supra) been drawn to the CAT decision in **The Government of Vietnam** case (supra) it (this court) would have changed course and decide otherwise.

Having observed as above I answer the question posed herein above negatively to the effect that according to our law an ex-parte decree is not appealable before the judgement debtor unsuccessfully applies for setting aside the decree before the court that passed it.

It follows thus that the application at hand for extension of time to appeal against the ex-parte decree out of time becomes incompetent since even if it will be granted the law will not permit the applicant to file the intended appeal. The second prayer (for compelling the District Court to issue a proper decree for purpose of the intended appeal) will thus also be incompetent for being purposeless since according to the anatomy of the application the second prayer was intended to support the first prayer. Now since the first prayer is no more the second prayer is also no more. The entire application is thus rendered incompetent.

I further hold that the findingsI have just made herein above are forceful enough to dispose of the entire application without consideration to the first and second points of the PO. Otherwise, considering those two other points of the PO will amount to a mere superfluous or academic exercise of kicking an already dead horse, which is not the purpose of the adjudication process which is the core function of courts of law.

Having observed as above I accordingly strike out the application. Regarding costs the law guides that costs follow event unless there are good reasons to be recorded by the court for departing from the rule, see s. 30 of Cap. 33 and the case of **Njoro Furnitures Mart Ltd v. Tanesco Ltd [1995] TLR. 205**. In the matter at hand however, I have seen no any reason justifying my

departure from the general rule on costs. I therefore order that the applicant shall pay the costs of the application, it is so ordered.

JHK. UTAMWA
JUDGE
24/06/2016

24/06/2016

CORAM; Hon. S. S. Sarwatt, DR.
For Applicant; Mr. Musa Kasim, advocate.
For Respondent; present in person, and Mr. Audax Constantine, advocate.
BC; Mr. Omary Mkongo, RMA.

Court; Ruling delivered in the presence of the parties as per corum. Right of appeal fully explained, in court this 24th day of June, 2016.

S. S. SARWATT

DEPUTY REGISTRAR

24/06/2016